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No. 84-1468

Supreme Court of the United States

October Term, 1984

ROBERT L. DESEYN,
Petitioner,

vs.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Statement of the Case 1

Reasons for Denying the Writ of Certiorari 3

1. The District Court and the Court of Appeals Were Correct in Dismissing the Complaint for Failure to State a Federal Claim for Relief Because the Petitioner Presented No Facts Establishing a Claim Under 42 U.S.C., Section 1983 nor the Fourteenth Amendment to the United States Constitution 3
2. The District Court and the Court of Appeals Were Correct in Dismissing the Complaint for Failure to State a Federal Claim for Relief Because the Complaint Alleged No Claim Under 33 U.S.C., Section 407 4
3. The District Court Properly Granted Summary Judgment Since There Were No Genuine Issues of Material Facts 5

Conclusion 6

Appendix:

Ohio Rev. Code Section 6101.15 ..... A1

TABLE OF AUTHORITIES

Cases

Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972) 4

City of Evansville, Ind. v. Ky. Liquid Recycling (7th Cir.), 604 F.2d 1008 (1979) 5

Dayco Corp. v. Goodyear Tire & Rubber Co. (6th Cir.), 523 F.2d 389 (1975) 5

Guthrie v. Alabama By-Products Company (N.D. Alabama S.D.), 328 F. Supp. 1140 (1971) 5

National Sea Clammers Assn. v. City of N.Y. (3rd Cir.), 616 F.2d 1222 (1980) 5

Yates v. Island Creek Coal Co. (W.D. Virginia), 485 F. Supp. 995 (1980) 5

Constitutional Provisions, Statutes & Rules

U.S. Const., Amend. XIV 2

28 U.S.C., §1343(3) and (4) 2

33 U.S.C., §407 ..... 2, 4, 6

42 U.S.C., §1983 ..... 2, 3

Ohio Rev. Code §6101.15(K) 4

Fed. R. Civ. P. 12(b)(1), (2) and (6) 2, 6

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STATEMENT OF THE CASE

Respondent is a political subdivision of the State of Ohio, organized as a Conservancy District pursuant to Ohio statutes. Petitioner is the lessee and Respondent the lessor of a certain parcel of real estate located in Tuscarawas County, Ohio.

A "Cottage Site Lease", dated August 1, 1969, is the basis of this lessor-lessee contractual relationship. This lease is expressly subject to:

> "all existing oil and gas leases . . . . thereunto pertaining . . . ."

The leased premises are included in an Oil and Gas Lease dated June 1, 1967.

Petitioner filed his Complaint against Respondent in the United States District Court for the Northern District of Ohio, Eastern Division, on November 10, 1982, alleging jurisdiction based upon 28 U.S.C., Section 1343(3) and (4), the Fourteenth Amendment to the United States Constitution, 42 U.S.C., Section 1983 and 33 U.S.C., Section 407 (Refuse Act of 1899).

Respondent filed a Motion to Dismiss on November 23, 1982, based upon Federal Rules of Civil Procedure 12(b)(1), (2) and (6), accompanied by three exhibits and two affidavits.

Petitioner filed a Response to the Motion to Dismiss, attaching four exhibits, three of which were outside the pleadings, on December 3, 1982.

The crux of Petitioner's Complaint was that Respondent was *contemplating* oil and gas well drilling activities in the area adjacent to Atwood Lake and in the vicinity of Petitioner's leased premises, which activities would allegedly result in damage to Plaintiff's residence dwelling, water well and "pollute" Atwood Lake.

The facts are that any drilling activities, whether contemplated or not, *will not* be conducted by Respondent, but would be conducted by the Lessee under the Oil and Gas Lease. Respondent has express statutory authority to lease interests in real property.

Furthermore, *Petitioner presented no facts to the District Court demonstrating the probability of damage to Petitioner's residence or water well nor of pollution to Atwood Lake if the contemplated drilling activities did in fact occur.*

Respondent wishes to advise this Court that many of the "facts" set forth in Petitioner's Statement Of The Case (pages 11-19) and at page 53 of his Petition are not in the record in this cause.

On May 20, 1983, the District Court granted summary judgment in favor of Respondent. Petitioner appealed this decision to the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals unanimously affirmed the District Court's Judgment on September 11, 1984. On December 7, 1984, Petitioner's petition for rehearing was denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT IN DISMISSING THE COMPLAINT FOR FAILURE TO STATE A FEDERAL CLAIM FOR RELIEF BECAUSE THE PETITIONER PRESENTED NO FACTS ESTABLISHING A CLAIM UNDER 42 U.S.C., SECTION 1983 NOR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner's claim is that the action of Respondent in leasing its land for oil and gas drilling, *an act that occurred before Petitioner acquired any interest in the Cottage Site Lease,* denied Petitioner a "right, privilege or immunity" secured by the Federal Constitution or a federal statute. There is obviously no Constitutional provision nor federal statute that affords a person a "right, privilege or im-

munity" to prevent a lessor of real estate from leasing mineral rights, much less "the right, privilege or immunity" to void a prior lease of mineral rights occurring before the person complaining acquires an interest in the real estate by virtue of a lease.

The claim *that Petitioner will engage in drilling activities* that will result in various and sundry damage to Respondent is *without factual basis.*

The Petitioner is authorized by Ohio statute to lease its real estate. Section 6101.15(K), Ohio Revised Code.

As the District Court correctly held, Petitioner's property rights are defined by the lease agreement. The Lease was subject to existing oil and gas leases, the mineral lease in question was prior to Petitioner's assigned lease and Petitioner had no federal claim relative to the lease of oil and gas drilling rights. *Board of Regents v. Roth,* 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

Finally, there is no "evidence" that oil and gas drilling activities would damage Petitioner in any way whatsoever.

2. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT IN DISMISSING THE COMPLAINT FOR FAILURE TO STATE A FEDERAL CLAIM FOR RELIEF BECAUSE THE COMPLAINT ALLEGED NO CLAIM UNDER 33 U.S.C., SECTION 407.

In the first place, there is *absolutely no evidence* that the drilling activities, whether presently contemplated or not, will pollute Atwood Lake.

Secondly, 33 U.S.C., Section 407, has been consistently construed not to provide a private cause of action.

City of Evansville, Ind. v. Ky. Liquid Recycling (7th Cir.), 604 F.2d 1008, 1011-1012 (1979); *National Sea Clammers Assn. v. City of N.Y.* (3rd Cir.), 616 F.2d 1222, 1232 (1980); *Yates v. Island Creek Coal Co.* (W.D. Virginia), 485 F. Supp. 995, 996-997 (1980); *Guthrie v. Alabama By-Products Company* (N.D. Alabama S.D.), 328 F. Supp. 1140, 1144-1145 (1971).

3. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT SINCE THERE WERE NO GENUINE ISSUES OF MATERIAL FACTS.

The Exhibits, outside the pleadings, submitted by Petitioner in response to Respondent's Motion created no genuine issue of material fact. The exhibits to which Petitioner refers in his Petition herein at page 58 (PT 3-1) did not present any factual basis "to challenge the validity of the 1967 lease".

Petitioner next, after admitting that he submitted exhibits outside the pleadings in an attempt to challenge Respondent's Motion, claims that he did not have notice sufficient to allow the submission of exhibits in opposition thereto.

As stated in *Dayco Corp. v. Goodyear Tire & Rubber Co.* (6th Cir.), 523 F.2d 389 (1975) at page 393:

> "Whether notice of conversion is required or not depends upon the facts and circumstances of each case. Where one party is likely to be surprised by the proceedings, notice is required. *Since Dayco participated in the pre-trial proceedings and filed counter-affidavits, it cannot claim unfair surprise when the district court converted the motion to dismiss to one for summary judgment.*" (Emphasis supplied)

Finally, the judgment of the District Court would stand if treated as a Motion to Dismiss the Complaint under Federal Civil Rule 12(b)(1), (2) and (6). The allegations of the Complaint do not state a Claim under 33 U.S.C., Section 407.

CONCLUSION

Both the District Court and the Court of Appeals for the Sixth Circuit correctly determined that Petitioner's Complaint should be dismissed. Therefore, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Title 61, Section 6101.15 of the Ohio Revised Code provides in part:

> In order to accomplish the purposes of the conservancy district, the board of directors of a conservancy district may:
>
> . . .
>
> (K) Hold, encumber, control, acquire by donation, purchase or condemnation, construct, own, lease, use and sell real and personal property. . . .